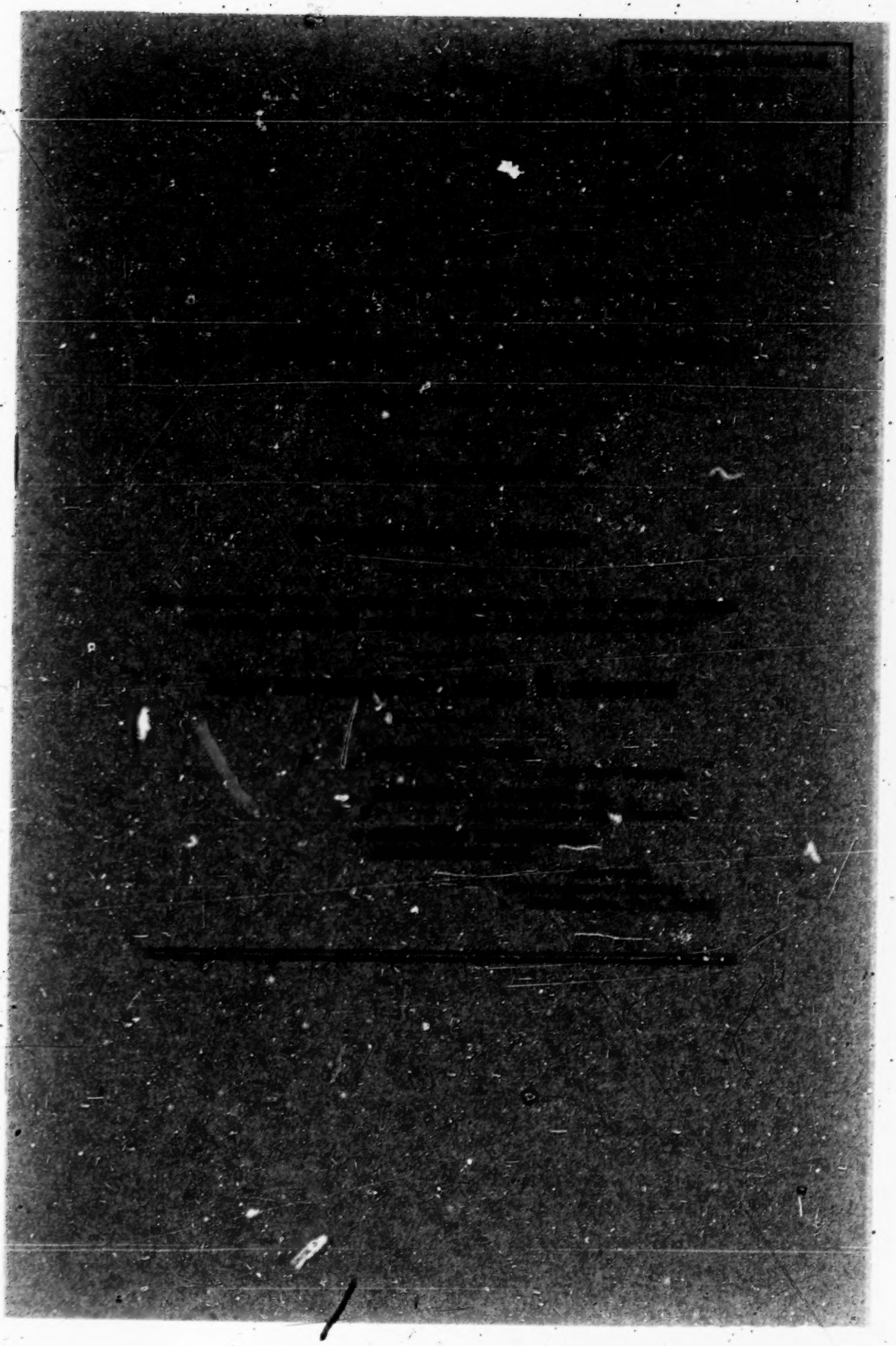


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732-568—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1090

MAX BLUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 23–28) is reported at 329 F. 2d 49.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1964 (Pet. 23). Petitions for rehearing and for rehearing en banc were denied on April 8, 1964 (Pet. 30–31). The petition for a writ of certiorari was filed on May 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether customs agents in New York could search two packages en route by air express from

California to a Brooklyn consignee if they had reasonable cause to suspect that the packages contained smuggled goods.

2. Whether a certificate of the Swiss Consul was properly admitted into evidence.

3. Whether the evidence was sufficient to sustain the verdict.

STATUTE INVOLVED

Section 482 of Title 19, U.S.C., provides:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, peti-

tioner was convicted of facilitating the transportation of smuggled merchandise and receiving such merchandise in violation of 18 U.S.C. 545.[1] He was given concurrent sentences of 18 months imprisonment on each count. The court of appeals affirmed the convictions. The evidence may be summarized as follows:

On July 15, 1960, a Mexican youth brought a package into the Railway Express office in San Diego, California, for shipment to petitioner in Brooklyn, New York. The youth gave the name "Sluisco" as consignor, with an address in Chula Vista, California, a town eight miles from the Mexican border (Tr. 18, 29–30, 32, 52).[2] The express agent, who could not learn the contents of the package from the Mexican youth, attempted to locate the consignor (Tr. 31–32). He found that the telephone company had no listing for the address in Chula Vista (Tr. 32). The express agent informed a customs agent and the package was then dispatched to New York (Tr. 32–34).

The Mexican youth had told the express agent that he would return the next day. He did so, bringing another package consigned from "Sluisco" to petitioner, the contents of which were described as "cutlery" (Tr. 35, 40). The customs agent had been waiting for the youth to appear, but left for coffee just before he came (Tr. 36). When he returned and

[1] Petitioner was convicted on two of four counts in the five-count indictment which were submitted to the jury. He was acquitted on the concealment and purchase counts.

[2] "Tr." refers to the transcript of trial, and "R." refers to the government's appendix in the court of appeals, both of which we are lodging with the Clerk of this Court.

found the package, the agent applied a radioactivity detection device to its exterior (Tr. 43, 48). The device showed a "quite high" positive reaction, which indicated that the package contained some type of radioactive material—which might have been that used for luminous dials on watches (Tr. 48–49). The package was then flown to New York.

Two days later in New York customs agents went to the airport, again tested the second package for radioactivity, and again found a "very positive reaction" (Tr. 134–135). That package was then taken to a Railway Express delivery depot in Brooklyn, where the first package had already arrived. Both were again examined for radioactivity, and they registered "very positive" reactions (Tr. 145). The packages were then opened in the presence of a Railway Express security agent and the customs agents, and were found to contain a large number of Swiss watches and watch movements (Tr. 67, 137–139).

The next day, after the watches had been repacked, a Railway Express driver and a disguised customs agent delivered the cartons to petitioner, who accepted them and paid the charges (Tr. 112–113). The disguised customs agent—who had gone before a United States Commissioner and obtained a search warrant—then returned to petitioner's residence in the company of other agents. The men showed their credentials and the warrant and were admitted by petitioner (Tr. 162). They told petitioner they were interested in the two packages recently delivered. He pointed them out, stating that they were not his

but belonged to the consignor (Tr. 163). When asked what was in the packages, petitioner first said, "I guess cutlery," but he appeared "extremely nervous" when he was asked to open the packages, and he then said, "No, no, they might be watches" (Tr. 163). The packages were seized, and petitioner was arrested.

Under a trade agreement in effect between Switzerland and the United States, all Swiss watches imported into the United States are required to bear a distinctive three-letter symbol which is issued by the Swiss government to each importer (R. 34a–36a; Tr. 153–155, 299–300, 329–331). When the contents of the packages were examined before delivery to petitioner, it was determined that the watches bore no such importer's symbol (Tr. 136). More detailed examination disclosed that three of the 2,149 watches bore a symbol which had been cancelled in 1960 (Tr. 375–377).

At the trial, the government introduced certificates of Collectors of Customs at ports of entry other than New York stating that they had no record of legal importation of these watches (R. 37a–51a; Tr. 237–238). The government also introduced a certificate from the Swiss Consul General stating that he had searched his records and found nothing pertaining to the importation of these unmarked Swiss watches (R. 59a–60a; Tr. 387). The Deputy Collector of Customs

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[1] No certificate was filed for New York because the volume of records to be examined was so large as to render it unfeasible.

of the Port of New York testified regarding the practices and regulations relating to the importation of Swiss watches (Tr. 328–343). He explained that in implementing of the trade agreement with Switzerland, the Commissioner of Customs requires that particulars concerning the arrival in the United States of any unmarked Swiss watches be sent in writing to the Swiss Consul General in New York (R. 53a–55a; Tr. 334, 337). He also testified that his office had no record of importation of unmarked watches by petitioner nor of any acknowledgement by the Swiss Consul General of notification pertaining to the watches involved in this case (Tr. 340–341).

Petitioner, who had been a watch dealer in 1960 (Tr. 417), testified that he had merely accepted the packages for one Sluis, who told him that they were arriving and would contain cutlery (Tr. 426). He had had several conversations with Sluis, who was a "traveling man" and had no address in New York where he could receive the packages, but had never actually done business with him (Tr. 424–427). Petitioner testified that he did not know that the packages contained watches, but had mentioned watches to the agents because the agents had told him that the search warrant specified watches (Tr. 419, 427). Petitioner also introduced evidence that quantities of seized unmarked Swiss watches—made by a different manufacturer—had been auctioned and sold to the general public by the Collector of Customs (Tr. 256). A customs agent testified for the government, however, that no watches of the sort involved in this case had

been sold in this manner from 1957 to 1960 (Tr. 397–399).

ARGUMENT

1. The search of the packages en route to their destination in Brooklyn was based on the customs agents' reasonable belief that they contained smuggled goods. The power to open and examine packages in transit under such circumstances is conferred by 19 U.S.C. 482, which authorizes the search of "any trunk or envelope, wherever found" if the agent has "reasonable cause to suspect" that such "trunk or envelope" contains smuggled merchandise.[1] It would require an excessively literal and self-defeating construction of the statute to exclude from its scope packages such as those in this case merely because they might not be popularly considered as "trunks" or "envelopes." It must have been Congress' intention in 1866—when this provision was enacted as part of the Anti-Smuggling Act (14 Stat. 178)—to include wrapped packages in transit along with the

[1] The distinction between searches of packages in transit which are believed to contain smuggled merchandise and searches of a dwelling for smuggled goods dates back to 1815, when Congress (3 Stat. 232) made it clear that

> * * * the necessity of a search warrant * * * shall in no case be considered as applicable to any * * * vehicle, of whatever form or construction, employed as a medium of transportation, or to packages on any animal or animals, or carried by man on foot.

Compare 19 U.S.C. 482 with 19 U.S.C. 1595(b), which explicitly requires a warrant for the search of a "dwelling house." *Cf. Boyd* v. *United States*, 116 U.S. 616, 623–624; *Carroll* v. *United States*, 267 U.S. 132, 151–152, 154.

containers specifically enumerated.[5] Consequently, the agents' authority to open and examine the packages under 19 U.S.C. 482, as well as under the Fourth Amendment, depended on whether they had "reasonable cause" at the time to suspect that smuggled goods were contained therein.[6]

The details concerning the grounds for the agents' suspicions were not fully developed at the trial because of the untimely nature of the motion to suppress. Although the search occurred on July 17, 1960, and the results of that search were explicitly set forth in the affidavit attached to the search warrant which was served on petitioner on the following day (Tr. 78, 431), no motion to suppress was made until November 14, 1962, which was the second day of the trial (Tr. 70). At this time, the California witnesses had completed their testimony and had been excused

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[5] Indeed, there is every reason to believe that the word "envelope" was used in 1866 not as it would popularly be used today—*i.e.*, to mean the cover of a letter—but for the primary definition then given the word. See, *e.g.*, 3 Oxford New English Dictionary (1897), p. 229, where it is defined as "[t]hat in which anything is enveloped: a wrapper, integument, covering."

[6] The court of appeals sustained the search on the ground that Railway Express had retained the right, by reason of its tariff provisions, to open misdeclared merchandise (Pet. 28). This tariff provision applies only to surface transportation, however, and not to air shipments such as those involved in this case. Consequently, we do not rely on this ground to sustain the lawfulness of the search.

It should also be noted that 19 U.S.C. 482 is not limited to searches at the immediate border where the merchandise enters. The statute expressly provides for examination of trunks and envelopes "wherever found," and this provision has been given full effect. See *United States* v. *Davis*, 272 F. 2d 149, [illegible] (C.A. 7); *Ramirez* v. *United States*, 263 F. 2d 385 (C.A. 5).

(Tr. 45, 61). However, the district court denied the motion on its merits (Tr. 90), and we submit that the record supports that result. The first package was brought in by a Mexican youth who could not describe its contents (Tr. 31). The consignor's given address was only eight miles from the Mexican border (Tr. 52), and the consignor could not be located in the telephone directory under the name furnished by the Mexican (Tr. 32). On the following day the same Mexican arrived with another package addressed to petitioner, and this one was marked "cutlery" (Tr. 36, 40). The application of an electronic device to the exterior of the second package showed the presence of radioactivity (Tr. 43, 47–49), which was obviously inconsistent with the declaration of the package's contents. Radioactivity was again noted in both packages in New York. In view of the fact that radium is used on watch dials and that the smuggling of Swiss watch movements is (next to narcotics) a major law enforcement problem for Customs,[3] there was good reason to believe that the package marked "cutlery," as well as the undescribed companion package, contained smuggled goods—most likely watches or watch movements. Under these circumstances, the agents were empowered to open the packages while they were in transit. *See Romero v. United States*, 318 F. 2d 530 (C.A. 5), certiorari denied, 375 U.S. 946, in which a similar examination of baggage checked at a railway station was sustained under 19 U.S.C. 482.

[3] See Treasury Department, Bureau of Customs, Agency Service, *Annual Report to the Commissioner* (1963), p. 7.

2. Petitioner contends, for reasons not stated at trial,* that the certificate of the Swiss Consul General concerning the absence of any records pertaining to the seized watches was inadmissible. Petitioner's present argument is that the document was not competent in the absence of proof that the Swiss officer had any duty to keep the records in question (Pet. 16). The record proves that this contention is without merit. The export of watches is a major concern of Switzerland, and it is the subject of a trade agreement with the United States. The Deputy Collector of Customs at the Port of New York testified that the consul general is notified in all instances in which unmarked Swiss watches are imported (Tr. 337). Hence it follows that records on this subject are maintained by the agencies concerned with enforcing the international trade agreement, and the Swiss Consul General is directly involved in such enforcement. In any event, as the court of appeals observed, it seems clear that the records underlying the certificate were kept in the regular course of the consulate's business, so that they would have been admissible in evidence under 28 U.S.C. 1732 (Pet. 27).

Petitioner also maintains that the authentications attached to the certificate gave it excessive weight in the eyes of the jury because of their "polite diplomatic language" (Pet. 17–19). These authentications were needed, however, to meet one of petitioner's

* At trial, defense counsel objected to the document on the ground that it was not properly authenticated; that a rule of criminal procedure was inapplicable to documents of a foreign country; and that the right of confrontation was denied (Tr. 383–386).

principal objections at the trial—*i.e.*, that the certificate was insufficiently authenticated (Tr. 383). If petitioner was concerned with their prejudicial impact he could have requested a cautionary instruction or asked that the allegedly offensive portion of the exhibit be masked. He did neither.

3. The evidence summarized in the Statement, pp. 3–7, *supra*, was manifestly sufficient to sustain petitioner's convictions for facilitating the transportation of smuggled merchandise and receiving the same. The jury could have concluded from the circumstances of the packages' delivery, the unmarked form of the watches, and the lack of any record supporting the possibility of lawful importation that the watches had been imported contrary to law. It could also have concluded from testimony concerning petitioner's conduct at the time of his arrest and from his possession of the merchandise that he knew that the watches had been smuggled into the country.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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